

them to prison for a period of 2 years. I do not see, why if a term of 2 years had in a recent case been imposed on a barrister for committing a breach of trust, against a member of the public, on a plea of guilty, the same term should not be imposed on the defendants who have committed a much more serious offence of deceiving, or attempting to deceive the court. I shall nevertheless by virtue of section 6(1) of the High Court rules, suspend the order till after the final disposal of this suit, on sufficient security being furnished by them to the Senior Assistant Registrar for their appearance in this court to abide by the order of committal.

I should like in passing to record my appreciation of the invaluable assistance which has been rendered by Counsel on both sides in this case. I would particularly like to mention Mr. Cashin but for whose tireless and tenacious effort this case would never have seen the light of day. It is regrettable if my decision had revealed itself rather later than what had been reasonably expected but I can assure all concerned that no harm was intended. The voluminous documents I had to go through and the lengthy submissions I had to pore at, not to mention that my present task takes me constantly to everywhere but in fact to nowhere, that it seems to me that delay is somewhat just possible and inevitable.

Order accordingly.

Solicitors: *Subra Naicker & Co.; Allen & Gledhill; Shearn Delamore & Co.; Wong & Paramjothy.*

PUBLIC PROSECUTOR v. SALLEH BIN SAAD

[O.Cr.J. (Syed Agil Barakbah J.) June 17 & 20, 1979]

[Alor Star – Kedah Criminal Trial No. 43 of 1977]

Dangerous Drugs – Trafficking in 19,364 gms. of raw opium and 8,093 gms. of morphine, charge of – Drugs found in bags concealed in car – “anything whatsoever containing any dangerous drug” – Whether this refers to motorcar – Defence failed to raise reasonable doubt on prosecution case – Dangerous Drugs Ordinance, 1952, ss. 12(2) & (3), 33, 37A(1) 39B(1)(c).

The accused was charged for trafficking in dangerous drugs on his own behalf to wit, 19,364 gms. of raw opium and 8,093 gms. of morphine at an unnumbered house at Kampong Tengah, Mukim Keplu, Kedah on October 11, 1976. At the close of the case for the prosecution, the learned trial judge amended the charge to 2 charges, viz., for trafficking in the amount of morphine and for being in possession of the same amount of raw opium under section 12(2) and punishable under section 12(3) of the Dangerous Drugs Ordinance, 1952.

The facts revealed were as follows. On the day in question, at 7.00 a.m. on information received, Superintendent of Customs (P.W.3) accompanied by Senior Customs Officer (P.W.4) and other Customs Officer raided the accused's house. There was a car parked under the house and with the keys obtained from the accused P.W.4 unlocked the front door of the car and commenced to make a search. He found 2 sacks containing blocks of morphine (a dangerous drug under Part III First Schedule of the Ordinance as proven by the evidence of the Government Chemist) under the bonnet of the car. They were placed on either side of the engine compartment. On being questioned by P.W.3 as to the contents of the 2 sacks, the accused replied “morphin sembilan ketul semuanya”. P.W.3 noticed that the accused looked frightened. The accused then pointed to a spot 15 feet away from the car where another sack was lying among other goods. When P.W.3 asked as to the contents of the sack, the accused replied “chandu sebelas ketul”. This was subsequently proven by the Government Chemist to be raw opium, a dangerous drug under Part I, First Schedule of the Ordinance.

The defence was a denial of the alleged admissions but not the discovery of the drugs at the places stated, and as to the amount and nature thereof. An objection was also raised by the defence regarding the admissibility of the accused's admissions having regard to the words “after his arrest” appearing in section 37A(1) of the Ordinance. The court was also faced with the question as to whether the words “anything whatsoever containing any dangerous drug” refer to the motorcar. If so, the presumption that the accused was in possession and to have known the nature of such drug arose thereby requiring the defence to prove to the contrary on the balance of probabilities.

Held: (1) the words “after his arrest” appearing in section 37A(1) of the Ordinance mean after actual arrest and not constructive arrest. It was therefore unnecessary for P.W.3, a Senior Customs Officer, to administer the statutory caution as required under the same sub-section to the accused. The accused's admissions were therefore admissible;

(2) in the present case the motorcar in question was not the container that contained the morphine but the 2 sacks which were used to keep the blocks together were the containers. The presumption under section 37(d) therefore did not apply;

(3) the facts in issue clearly showed the accused did an act preparatory to or for the purpose of trafficking in morphine. He also had knowledge and was in conscious possession of the opium found on the floor of his house.

(4) in the light of the circumstances, the defence had not raised any reasonable doubt to the prosecution case. The accused was guilty on both charges and should be convicted; as he was most probably a carrier of drugs, the sentence of life imprisonment with effect from the date of arrest was justifiable and a deterrent.

Cases referred to:

- (1) *Poon Heong v. Public Prosecutor* [1949] M.L.J. 114.
- (2) *Tong Peng Hong v. Public Prosecutor* [1955] M.L.J. 232.

- (3) *Public Prosecutor v. Ong Chang Sow* [1954] M.L.J. 82.

CRIMINAL TRIAL.

Abdul Malik bin Haji Ishak (Deputy Public Prosecutor) for the Public Prosecutor.
Karpal Singh for the accused.

Cur. Adv. Vult.

Syed Agil Barakbah J.: The Accused is charged for trafficking in dangerous drugs on his own behalf, to wit, 19,364 grammes of raw opium and 8,093 grammes of morphine at an unnumbered house at Kampong Tengah, Mukim Kuplu, in the District of Kubang Pasu, in the State of Kedah at about 7.00 a.m. on October 11, 1976. At the close of the case for the prosecution, I amended the charge to two charges, viz., for trafficking in the amount of morphine as stated in the original charge and for being in possession of the same amount of raw opium under section 12(2) and punishable under section 12(3) of the Dangerous Drugs Ordinance, 1952.

From the facts and circumstances of the prosecution case and by virtue of sections 33 and 39B(1)(c) of the Ordinance, I hold that the Accused at the material time and place did an act preparatory to the commission of trafficking. Hence the first amended charge. As the offence took place in October, 1976, the amendments to the definition of "trafficking" in section 2 and section 37(da) which were made on March 17, 1977, did not come into play.

The evidence adduced by the prosecution is that on the day in question at about 7.00 a.m. on information received, Superintendent of Customs Zanzabir (P.W.3) accompanied by Senior Customs Office Tee Thean Huat (P.W.4) and other Customs Officers raided the Accused's house. P.W.3 and P.W.4 proceeded to the kitchen portion of the house where they met the Accused's wife (D.W.5) who on being questioned stated that the Accused was in the toilet (W.C.) outside the house. The rest of the party surrounded the house. There was a Mercedes car parked under the house (Ex. P10) No. JD7944. When the Accused came out from the toilet, P.W.3 obtained from him the keys to the car (Ex. P9 A-D) and in the presence of the Accused, his wife, children and P.W.4 he unlocked the front door of the car and commenced to make a search. On pulling the lever under the dashboard of the bonnet, P.W.3 recovered two

sacks which contained blocks of morphine, a dangerous drug under Part III of the First Schedule to the Ordinance as proven by the evidence of the Government Chemist. (PW1). Each sack containing the drugs was found to be placed on either side of the engine compartment under the bonnet as shown in photograph Ex. P8C. On being questioned by P.W.3 as to the contents of the two sacks, the Accused replied "Morphine sembilan ketul, semuanya". P.W.3 noticed that the Accused looked frightened. The Accused then pointed to a spot about 15 feet away from the car where another sack was lying among other goods as shown in photograph Ex. P8D on the ground floor. When P.W.3 asked as to the contents of the sack, the Accused replied "Chandu sebelas ketul". P.W.3 examined the sack in the presence of the Accused and P.W.4 and found 11 slabs which he suspected to be, and subsequently proved by the Chemist to be raw opium, a dangerous drug under Part I, First Schedule of the Ordinance. No other incriminating evidence was found on a further search of the house. The accused was then arrested and taken to the Customs Office, Alor Star, with his wife and three children where their statements were duly recorded.

An objection was raised by the defence counsel as regards the admissibility of the Accused's admissions having regard to the words "after his arrest" appearing in section 37A(1) of the Ordinance. For the ground stated earlier in the notes of proceeding I held that those words mean after actual arrest and not constructive arrest. It was therefore unnecessary for P.W.3, a Senior Customs Officer, to administer the statutory caution as required under the same sub-section to the Accused. His admissions, in my considered judgment, are therefore admissible. A trial within a trial was also held with regard to the admissibility or otherwise of the cautioned statement made by the Accused to P.W.3. For the reasons stated in the notes of proceeding, I hold that it is not admissible on the ground that the statutory caution had not been administered in full due to the absence of certain vital words and the addition of other words. (The decision of the Court of Appeal in *Poon Heong v. Public Prosecutor*⁽¹⁾ followed). In the light of the above, the prosecution case depends on the admissions of the Accused to P.W.3 with regard to the drugs recovered both in the car and on the ground floor of the house, apart from other evidence adduced.

The defence of the Accused was a denial of the alleged admissions but not the discovery of

the drugs at the places stated, and as to the amount and the nature thereof. The Accused testified that when P.W.3 questioned him as to the contents of the two sacks found in the car, he replied that he did not know. He also denied pointing to the third sack on the floor and of informing P.W.3 that it contained opium, because he had no knowledge of it. He however stated that the motorcar belonged to one Haji Ahmad (P.W.8) who had handed the keys to him. He had to oblige him in parking the car under his house because he was the driver of P.W.8's taxi which was kept at another place. He further stated in cross-examination, the day before the raid he had driven the Mercedes with P.W.8 to Kangar for repairs to its body which had rusts and had taken the car back to his house at about 5.00 p.m. the same day. Strange enough when P.W.8 gave evidence he was never cross-examined at all on the matter by the defence counsel. In the light of the facts and circumstances I cannot but come to the conclusion that this was an after-thought by the Accused himself for otherwise the learned defence counsel would not have left any stones unturned to put up a more concrete and probable defence on the matter. His three children D.W.2, D.W.3 and D.W.4 supported the Accused's testimony. They admitted that P.W.3 questioned the Accused with regard to the two sacks found in the car and to which the Accused replied that he did not know. Then P.W.3 showed the Accused a third bag which he recovered. The Accused also replied that he did not know. On the other hand, the Accused's wife (D.W.5) who was the first to meet P.W.3 and had conversation with him, stated that she did not hear of any conversation between her husband and P.W.3 although she was there. According to her, when she was near the car with P.W.3 and the Accused, the three children were still sleeping in the house and that they came down subsequently on being called. Considering the above carefully, I conclude on the facts and circumstances that the three children were still not there when the conversation took place and D.W.5 would not have hesitated in repeating the same if at all the Accused denied knowledge of the drugs to P.W.3. She appears to be a straight-forward and simple woman. To my mind, although they are interested witnesses and in normal circumstances would try to save the Accused, I still have to consider their evidence and give weight to it according to the facts and circumstances. Similarly, in the case of P.W.3 and P.W.4 who if at all are interested witnesses were officers of the Customs carrying out their duty under the law. The Accused

A admitted that he had never met nor known either P.W.3 or P.W.4 prior to the day in question and there was no grudge or misunderstanding between them. I do not therefore have any reason to believe or conclude that P.W.3 and P.W.4 had concocted the admissions made by the Accused as stated above. On the other hand, the Accused told a lie with regard to the keys of the car. He denied handing the keys to P.W.3 and that the car doors were locked at that time. According to him the keys were hanging from one of the pillars in the kitchen portion of the house and P.W.3 took them from there. The evidence did not indicate at all that P.W.3 entered the kitchen portion of the house but all the while he was waiting outside for the Accused to come out from the toilet. There were no special markings on the keys to show that they belonged to the car under the house. P.W.3 being a stranger and had come to the house for first time would not have found or known about the keys had it not been that it was the Accused who handed them to him. Secondly, the keys would only be required for use and according to P.W.3 he used one of them to unlock the door of the car. The facts and circumstances clearly show that the car was locked.

A question arose as to whether the burden of proof on the defence was either on the balance of probabilities or to raise a reasonable doubt on the prosecution case because of the presumptions under section 37 of the Ordinance. With regard to the first charge, section 37(h) in my view does not arise because the two bags of morphine were not concealed in any specially constructed compartment for the purpose in the car. Similarly, as regards the second charge, the raw opium was not found concealed in the house but placed amongst other bags and articles as shown in photograph Ex. P8D. Subsection (d) is of vital importance. It states:—

“(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;”

The point is whether the words “anything whatsoever containing any dangerous drug” refer to the motorcar. If so, the presumption that the Accused was in possession and to have known the nature of such drug arises thereby requiring the defence to prove to the contrary on the balance of probabilities. I am in agreement with the test applied by Thomson J. (as he then was) in *Tong Peng*

Hong v. Public Prosecutor.⁽²⁾ At page 233 His Lordship says:—

"The words 'anything whatsoever' by themselves have as wide a meaning as any words can have but that meaning is governed and greatly restricted by the word 'containing'. A thing containing another thing is not synonymous with a thing in which that other thing is. To take an extreme example, it is not correct to say the earth contains the fly which at the moment is walking up the wall of my Chambers. Both by derivation and by ordinary usage the word 'containing' implies some measure of holding or restriction. The jar contains the jam but the cupboard contains the jar. In short, a container is not something in which another thing is. It is something which surrounds or holds another thing so as to prevent that other thing from being elsewhere."

That case is distinguishable from *Public Prosecutor v. Ong Chang Sow*⁽³⁾ which a locked box containing opium was found under the bed of the Accused and the keys of which were held by another person. The box is the container and not the room. I therefore hold that in the present case the motorcar in question is not the container that contained the morphine but the two sacks which were used to keep the blocks together are the containers. The presumption therefore does not apply.

The duty of the defence is to raise a reasonable doubt on the prosecution case. As I said earlier, the prosecution case depends on the admissions by the Accused to P.W.3 as corroborated by P.W.4. This is an extra-judicial confession which I considered with caution as to the weight to be attached. It was made voluntarily by the Accused to P.W.3 who was carrying out his official duty. There is corroboration by another officer (P.W.4) of what actually transpired. I have no reason to doubt the truth of such admissions which were made by the Accused on the spur of the moment in the least expected time when caught red-handed by P.W.3 and his raiding party. (See *Sarkar* on Evidence, 12th Ed., p.230). The facts in issue clearly show the Accused did an act preparatory to or for the purpose of trafficking in morphine. He also had knowledge and was in conscious possession of the opium found on the floor of his house.

In the light of the facts and circumstances as stated above taken as a whole, I conclude that the defence has no raised any reasonable doubt to the prosecution case. I therefore find the Accused guilty on both charges and convict him.

As regards the sentence, in view of his age and that he was most probably a carrier of drugs, the

sentence of life imprisonment with effect from the date of arrest is justifiable and a deterrent.

Convicted and sentenced accordingly.

Solicitors: *Karpal Singh & Co.*

MOHAMED YUSOF BIN HAJI AHMAD v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Agil Barakbah J.) November 19, 1980]

[Alor Star — Kedah Criminal Appeal No. 69 of 1979]

Dangerous Drugs — Trafficking of 2,700 gms. of cannabis — Defence of duress rejected — Sentence reduced from life imprisonment and whipping to life imprisonment only — Dangerous Drugs Ordinance 1952, ss. 37A & 39B.

Criminal Law & Procedure — Appellant accused of trafficking — Cautioned statement taken by investigating officer admissible — Threat by indirect approach — Caution becomes ineffective — Criminal Procedure Code, ss. 112 & 113 — Evidence Act 1950, ss. 3 & 24.

The appellants was found guilty of trafficking on his own behalf of dangerous drugs to wit 2,700 gms. of cannabis, an offence under section 39B(1)(a) of the Dangerous Drugs Ordinance 1952 on December 27, 1977 at the Railway Station, Perlis. He was sentenced to life imprisonment and with four strokes of the rotan. He appealed against both the conviction and sentence. The appellant contended that the learned trial President failed to scrutinize the evidence of P.W.4 the police inspector who recorded the cautioned statement from the appellant, in its proper perspective. Had he done so he would not have admitted it.

The appellant admitted that he carried the 2 bags containing cannabis but maintained that he did so under threat from a male Thai whom he met by chance in a hotel. The man threatened him with a pistol and told him to carry the two bags across the border to the railway station, Padang Besar, and if he did so the Thai promised to pay him M\$400 but if he did not do so he would be shot.

Held, dismissing the appeal: (1) since proof of inducement or threat is difficult, the discretion of the court is unfettered by the concrete standard of proof necessary in other cases. The court is therefor free to scrutinize the evidence and surrounding circumstances to determine the presence or absence of any threat or inducement, its sufficiency and how it worked in the mind of the accused;

(2) the fact that P.W.4 who recorded the accused's statement was also the investigating officer by itself was insufficient to render the statement inadmissible;

(3) threat or inducement need not only be made by direct means. It is sufficient by an indirect approach eg. from the mannerism of speech or conduct of the person in authority and the present court was satisfied from the